IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY

WEDNESDAY, THE 14TH FEBRUARY 2007 / 25TH MAGHA 1928

CRL.A.No. 728 of 1999(D)

ST.130/1997 DTD. 06/07/99 OF JUDL. MAGISTRATE OF FIRST CLASS COURT, KUNNAMKULAM.

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APPELLANT/COMPLAINANT:

BINEESH,
S/O. KALARIKKAL ARAVINDAKSHAN,
ARTHAT VILLAGE,
CHEMMANOOR DESOM,
THALAPPILLY TALUK.

BY ADV. SRI.JOSE K.KOCHUPAPPU,
SRI.V.G.SANKARAN.

RESPONDENTS/ACCUSED:

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1. **VELAYUDHAN, S/O. KANNAN,**
   NEAR KOTAPPALLI CHUNGAM,
   POOKODE VILLAGE,
   CHAVAKKAD TALUK.

2. **STATE OF KERALA, REPESENTED BY THE**
   PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
   ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. K.M. FIROZ.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 14/02/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY, J.

Crl. Appeal No. 728 of 1999

Dated this the 14th day of February, 2007

Judgment

This appeal is filed against an order of acquittal. Even though notice was issued on 13.10.1999, no effective steps were taken to issue notice to the accused. Without notice to the accused, order of acquittal cannot be reversed. Therefore, appeal is liable to be dismissed on that ground also. However, since this is a criminal appeal, I have looked into the merits of the case also. According to the complainant who is a contractor by profession, accused is a milk purchaser doing business near the house of the complainant. Rs.18,000/- was given by the complainant and a cheque was issued by the respondent/accused, but, cheque was dishonoured for insufficiency of funds. The complaint was filed after complying with the statutory formalities. The accused denied the charges. The complainant was examined as PW2 and accused was examined as DW1. Case of the accused was that he had borrowed an amount of Rs.5,000/- from PW1's father Aravindakshan and that debt was cleared by giving by one litre milk daily to Sagara Finance. Admittedly, the accused is a milk merchant by profession. He is residing

at Pookkode. Whereas PW1 is residing at Arthat. DW1 is aged 75 years and PW2 is aged 24 years. After considering the evidence, the trial court found as follows:

> "PW2 had fairly admitted in cross-examination that his father is conducting 'Sagara Finance' at Kottappadi. To a definite question PW1 did not give any answer regarding his relationship with accused, he was not able to locate the residence of the accused. To a definite question PW2 would give no answer "
>
> cheque leaf
>
> (Q). No answer". If Ext.P1 was issued to the complainant definitely he should deny the suggestion made by the defence. Similarly, he is not able to deny the transaction between the accused and his father."

It was also found that there is no evidence to show that who has written in Ext.P1 cheque. It was also further found as follows:

> "On a perusal of Ext.P1 it is evident that the signature just is in a different ink than the other writings. Where there is such ambiguity the complainant must establish the proper execution of the cheque by the accused. Here the complainant failed to establish the proper execution of the cheque by the accused. So the presumption under section 139 of the Act will not have

> any application in this case. The version narrated by the accused when compared with the version of the complainant seems to be more probable. The contradictory version given by PW2 except shows that he had n presumption with the accused and the amount was taken up by the accused from Sagara Finance which is run by PW1's father Aravindakshan."

After analysing the evidence, the trial court found that the cheque was not issued and discharged for a legally enforceable liability. After considering the evidence, I am of the view that the defence of the accused is more probable and no grounds are made out for interfering in the order of acquittal.

In this connection, I also refer to the decision of the Apex Court in M.S. Narayana Menon @ Mani v. State of Kerala and another (2006 (3) KLT 404).

Appeal is dismissed.

J.B. KOSHY
(JUDGE)

vaa

J.B.Koshy J.

Crl. A. No. 728 of 1999

Judgment

14-2-2007